At no time did West move for reconsideration of the District Court's ruling, argue that his right to a jury trial had been violated, or otherwise provide the District Court with an opportunity to address his alleged Seventh Amendment violation.

West appealed this ruling to the Eleventh Circuit Court of Appeals. In his initial and rely briefs, West argued: (1) that his Seventh Amendment Rights had been violated; (2) that the District Court improperly resolved issues of fact and assessed the credibility of witnesses in applying the nine-factor borrowed servant test; and (3) that the District Court's determination that West was DynCorp's borrowed servant was unsupported by the record. However, at no point did West argue that the District Court's application of the nine-factor borrowed servant test was in conflict with any Eleventh Circuit opinion or the decision of any other circuit court.

On August 15, 2005, the Eleventh Circuit Court of Appeals issued an unpublished *per curiam* opinion affirming the District Court's decision that West was DynCorp's borrowed servant. *See* Petitioners' Appendix at 1a-4a. In the opinion, the Eleventh Circuit stated that its "examination of the record l[eft it] with no doubt that West consented to the bench trial and thereby waived his Seventh Amendment right to have a jury decide the issues of fact involved in the application of the borrowed servant doctrine." *Id.* at 4a. The Court further stated that it found no error in the District Court's resolution of the borrowed servant issue. *Id.*

West's Petition for Writ of Certiorari follows.

STATEMENT OF THE FACTS

The evidence adduced at the bench trial on April 20th and 21st demonstrated the following:

A. The Prime Contract

DynCorp had a contract (the "Prime Contract") with the Department of State to eradicate illicit drugs in South America and Pakistan. (D.E. 242 at 8-9). Under the Prime Contract, DynCorp was responsible for meeting the contract requirements and all standards set forth by the Department of State concerning the program. (*Id.* at 9).

B. The Subcontract

The Prime Contract required fixed wing pilots to fly aircraft and conduct aerial spraying missions. (D.E. 242 at 8-9). Since DynCorp did not have its own fixed wing pilots, it subcontracted with EAST, a nonparty, for qualified pilots. (*Id.* at 47, 49). Under the subcontract, EAST supplied DynCorp with fixed wing pilots, including West.

As a subcontractor, EAST had no direct or official communication with the Department of State. (*Id.* at 9). By contrast, DynCorp had weekly briefings with the Department of State. (D.E. at 24).

C. In-Processing

To participate in the eradication program, all personnel were registered through in-processing. The in-processing procedure was the same for both EAST and DynCorp employees. (*Id.* at 18). Employees from both companies were required to sign DynCorp's standards of conduct. DynCorp

retained the right to remove any EAST employee from the program with or without cause. (*Id.* at 10, 12, 15).

DynCorp acted as a *de facto* employer to EAST's pilots. DynCorp maintained flight records for both EAST and DynCorp pilots and ensured that all pilots met the required flight time. (*Id.* at 32). Only payroll stubs and hours for EAST employees were remitted to EAST. (*Id.* at 32-33). Although West was paid by EAST, EAST billed DynCorp on a monthly basis for the use of these pilots. (*Id.* at 33). DynCorp had the right to review and object to the invoices. (*Id.*)

D. Chain of Command

In Colombia, DynCorp conducted its spraying missions from two Forward Operating Locations (FOLs) in Larandia and San Jose. (*Id.* at 22). FOLs are similar to bases and housed both EAST and DynCorp personnel. West was stationed at the FOL in Larandia.

The FOL manager, a DynCorp employee, was responsible for providing administration, logistics, facilities, security, and safety, to both EAST and DynCorp employees at the FOL and approved all flight missions for that FOL. (*Id.* at 17-18; 22). The fixed wing lead pilot, rotary wing lead pilot, maintenance lead, and logistics lead were stationed at the FOL and received direction from the FOL manager. (*Id.* at 21). The fixed wing lead pilot was the highest-ranking EAST employee at the FOL in Larandia. (*Id.* at 26, 94-95). However, he was not a key employee under the contract. (*Id.* at 73).

The FOL manager reported to the operations manager (a DynCorp employee) stationed in Bogota, Colombia.

The operations manager, in turn, reported to the site manager, the top DynCorp employee in Colombia. (*Id.* at 20-21).

In Bogota, EAST also had a standardization pilot who ensured that EAST pilots were operating safely within standardized procedures. (*Id.* at 26). However, that employee had no authority over the spraying missions. (*Id.*).

E. Operations in Larandia

At the FOL, DynCorp treated all personnel, including EAST employees, the same. Both EAST and DynCorp employees were transported in the same manner and received the same daily allowance for their food. (*Id.* at 35-36). Like DynCorp employees, EAST employees were subject to random drug tests by DynCorp and would be released for a positive drug test. (*Id.* at 15-16). Drinking while in Larandia was prohibited for all personnel including EAST employees. (*Id.* at 16-17).

Once a pilot or mechanic arrived in Larandia, the FOL manager was responsible for providing housing accommodations. (*Id.* at 22). The housing provided to EAST personnel was the same as provided to DynCorp employees:

> DynCorp pilots, EAST pilots all live together in the same building and there's probably 15 or 16 people live there. Also in that same building were the SAR community of pilots, the rescue pilots. Not the – and the rescue men. The helicopter pilots and the EAST pilots both were there and the SAR.

(D.E. 242 at 81).

Through funding from the Department of State, DynCorp provided flight suits, boots, and bunks to all personnel, including EAST pilots. (*Id.* at 28). Although the Department of State supplied the aircraft, DynCorp was responsible for maintaining them. (*Id.*). EAST was allowed to assign its pilots to a particular work rotation; however, this was subject to review by DynCorp. (*Id.* at 55).

F. Spraying Missions

Prior to a spraying mission, the Colombian government determined what areas DynCorp was allowed to spray in. (*Id.* at 58). This information was communicated to DynCorp's FOL manager through the U.S. Embassy. (*Id.*). The FOL manager attended meetings for all operations and supervised flight planning and preparation for the missions. (*Id.* at 22-23). The FOL manager had final authority over the spraying missions because DynCorp was ultimately responsible to the Department of State for conducting the operations. (*Id.* at 24).

The FOL manager gave directives on the spraying missions to all the pilots, including West. (*Id.* at 83). Within the block designated by the Colombian government, the EAST fixed wing lead pilot determined what spray paths would be flown by a particular pilot. (*Id.* at 59, 144). EAST assigned these spray paths for accountability and record keeping purposes. (*Id.* at 144).

G. Worker's Compensation Benefits

The Prime Contract required that DynCorp obtain Defense Base Act Insurance for all employees who would be working overseas under the contract. (D.E. 242. at 146-

147). The subcontract required that DynCorp include EAST as an additional insured under its worker's compensation policy, in conformity with the Prime Contract. (*Id.*).

At the commencement of the bench trial, the parties stipulated that DynCorp provided worker's compensation benefits to West. (*Id.* at 6-7). West had received $225,000 in benefits under DynCorp's worker's compensation policy. (*Id.* at 6). In fact, DynCorp's policy had paid all medical bills for West's orthopedic and back injuries sustained in this accident.

REASONS FOR DENYING THE PETITION

The Petition for Writ of Certiorari should be denied because Petitioners have failed to show that this case warrants the Court's consideration. First, the record clearly establishes that West waived his right to a trial by jury on the borrowed servant issue. Second, Petitioners' conflict claim is entirely fabricated. The Eleventh Circuit Court's affirmance of the District Court's ruling that West was DynCorp's borrowed servant is supported by the record and comports with the holdings of *White v. Bethlehem Steel Corp.*, 222 F.3d 146 (4th Cir. 2000) and *Capps v. N.L. Baroid-NL Industries, Inc.*, 784 F.2d 615 (5th Cir. 1986). Third, the Eleventh Circuit Court's ruling below is an unpublished opinion and not binding precedent. Thus, it will not impact future cases.

I. PETITIONERS' SEVENTH AMENDMENT ARGUMENT IS WITHOUT MERIT BECAUSE THE RECORD SHOWS PETITIONERS KNOWINGLY AND WILLINGLY PARTICIPATED IN THE BIFURCATED BENCH TRIAL AND FAILED TO RAISE A TIMELY OBJECTION

The law is well settled that litigant waives his or her right to a jury trial by participating in a bench trial and failing to raise a timely objection. *Southland Reship v. Flegel*, 534 F.2d 639, 645 (5th Cir. 1976). Here, the record is clear that West waived his right to a jury trial by: (1) failing to object and in fact consenting to the District Court determining the borrowed servant issue as a matter of law; (2) fully participating in the bench trial; and (3) failing to alert the District Court of the alleged Seventh Amendment violation despite numerous opportunities to do so.

At the summary judgment hearing, DynCorp candidly acknowledged that disputed facts would preclude summary judgment on borrowed servant. Nonetheless, DynCorp maintained that this issue should be resolved by the Court. (D.E. 229 at 13-14). The District Court agreed with this position and was clear throughout the hearing that it intended to resolve the borrowed servant issue as a matter of law.

> It also makes no sense to me for me or the parties or their counsel to get together and spend the first three or four days of this trial, or however much it takes, sorting out these legal issues with respect to whether there was sufficient control over Mr. West by DynCorp for him to fall within the barred employee exception and whether the government contractor defense should apply.

> I'm inclined to think that maybe what we ought to do is to have a preliminary bench trial of some sort and get a complete record before me on those matters that need to be decided by me as a matter of law, and then if not dispose of, at least narrow, perhaps, the issues that are tried to the jury.

(D.E. 229 at 15-16) (emphasis added).

At the same hearing the District Court further stated:

> THE COURT: Okay. Now, on the worker's comp issue, we did take a quick look at some cases. I think it's pretty clear that that is a question of law for the Court. And on that particular issue, I do think it would behoove us to have a pretrial evidentiary hearing.

(*Id.* at 47) (emphasis added).

Despite clear indication by the District Court, at no time during the March 23, 2004 hearing did West protest that his right to trial by jury would be violated if the borrowed servant issue was decided by the District Court. On the contrary, counsel for West agreed with the District Court that this issue should be resolved prior to trial:

> [COUNSEL FOR WEST]: My suggestion is that we rule as a matter of law today. I don't think that we need to go any further, and the reason is because the affidavit of Michael Peterson is not based on personal knowledge. . . .

(*Id.* at 16-17). By contrast, at the same hearing, West was very adamant that he believed another issue, the government contractor's defense, was a jury question. (*Id.* at 43).

West's failure to raise any objection at the summary judgment hearing on the District Court determining borrowed servant coupled with his consent (at the same hearing) to resolving this issue as a matter of law is sufficient to establish waiver of his right to a jury trial. *See Haynes v. W.C. Cave & Co., Inc.*, 52 F.3d 928, 930 n.3 (11th Cir. 1995) (concluding that a failure to object to a fact-finding proceeding could waive the right to a jury trial).

> [W]here [as here] a party has made a general demand for a jury trial and the court subsequently determines that a certain issue will be determined non-jury, it is incumbent upon that party to timely lodge a specific objection in order to preserve any Seventh Amendment jury trial right he may have with respect to that issue.

In re City of Philadelphia Litigation, 158 F.3d 723, 727 (3d Cir. 1998).

Accordingly, West's claim that his Seventh Amendment rights were violated is without merit and does not provide a basis for certiorari review.

II. THE DECISION OF THE ELEVENTH CIRCUIT COURT OF APPEALS DOES NOT CONFLICT WITH THE RULING OF ANY OTHER CIRCUIT AND IS PLAINLY CORRECT.

A. There is no Conflict between the Eleventh Circuit Court's Ruling and The Rulings Of Other Circuits.

Petitioners seek Writ of Certiorari under the pretext that the Eleventh Circuit Court of Appeals and the District Court rendered decisions which allegedly conflict with the decisions of the Fourth and Fifth Circuit Courts of Appeals in *White v. Bethlehem Steel Corp.*, 222 F.3d 146 (4th Cir. 2000) and *Capps v. N.L. Baroid-NL Industries, Inc.*, 784 F.2d 615 (5th Cir. 1986). *See* Petitioner for Writ, p. 8. However, the Eleventh Circuit did not announce any controversial rule of law in this litigation. Rather, its decision that the trial court correctly applied the nine-factor borrowed servant test comports with prior rulings in its own circuit and the holdings of *White* and *Capp*.

In *White v. Bethlehem Steel Corp.*, 222 F.3d 146 (4th Cir. 2000), the Fourth Circuit determined that the plaintiff was a borrowed servant of defendant Bethlehem Steel. The court considered the following facts supporting borrowed servant status: (1) the plaintiff's employer paid plaintiff's wages and insurance but passed those costs through to Bethlehem Steel; (2) Bethlehem Steel employees would tell the plaintiff where to go; (3) Bethelem Steel could effectively fire the plaintiff by excluding him from a job site; (4) and Bethlehem Steel assigned the plaintiff to the ships where he would work. *Id.* at 150.

These facts supporting borrowed servant in Bethlehem Steel are also present in our case. Although West was paid by EAST, EAST billed DynCorp on a monthly basis for the use of its pilots, including West. (D.E. 242 at 33). DynCorp retained the right to remove an EAST employee from the program with or without cause. (*Id.* at 10, 12, 15). Pilot assignment to a particular work rotation was subject to review by DynCorp (*Id.* at 55). Moreover, a DynCorp employee, the FOL manager, approved all flight missions and was responsible for providing administration, logistics, facilities, security, and safety for both EAST and DynCorp employees. (*Id.* at 17-18; 22). Lastly, the FOL manager gave directives on the spraying missions to all the pilots, including West, and had final authority over the spraying missions. (*Id.* at 24, 83). Thus, under *White*, West would still be DynCorp's borrowed servant.

Moreover, notwithstanding Petitioners' unfounded contention, *White* and *Capp* do not stand for the proposition that the borrowed servant doctrine requires a direct supervisory role by the borrowing employer. Supervision of the borrowed employee is only a factor in determining whether the control prong is met. In fact, *White* noted that other factors in addition to supervision should also be considered:

> In order to determine direction and control, a court may look at factors such as the supervision of the employee, the ability to unilaterally reject the services of the employee, the payment of wages and benefits either directly or by pass-through, or the duration of the employment. *Ultimately, any particular factor only informs the primary inquiry*

> *– whether the borrowing employer has authoritative direction and control over a worker.*

White, 222 F.3d at 149. (emphasis added). Thus, neither *Capp* nor *White* support West's contention that a direct supervisory role is a *sine qua non* to finding borrowed servant status. The District Court and the Eleventh Circuit's decision in the instant case do not conflict with *White* or *Capp* in any sense of the word.

In any event, the record supports the District Court's determination that DynCorp's relationship with West satisfied the control factor in the nine-factor borrowed servant test. (D.E. 260 at 46-47). Under the Prime Contract, DynCorp had final authority and was ultimately responsible to the Department of State for the operation of the program. (D.E. 242 at 9). DynCorp had final authority and was ultimately responsible for operations. (*Id.* at 24). DynCorp also had authority over the assignment of pilots to a rotation and could seek the removal a pilot from a rotation. (*Id.* at 34-35). By contrast, EAST's role was limited to supplying pilots. (*Id.* at 49).

Moreover, the District Court's inquiry in deciding that the control factor favored DynCorp was not limited to the terms of the prime contract, as West contends. *See* Petition for Writ, p. 9. The District Court considered the day-to-day operations of the drug eradication program and found that EAST had very little involvement with the spraying missions:

> [t]he only thing EAST d[id] in the [spraying mission] process [was] to designate . . . West as being a pilot on that particular rotation and . . . once the spray area [was] determined and the

> aircraft to be flown [were] determined, the only real involvement that EAST [had] in connection with the [spraying] mission [was] divided amount the pilots, the particular supply path to be employed in this particular operation which seems to me to be hand in hand with flying the airplane because obviously you don't want to spray the same area or run into each other in the process.

(D.E. 260 at 47).

The District Court's findings were supported by Norbert Violette, an EAST employee and former DynCorp OPS Manager, who testified at the bench trial that the purpose of assigning spray lines to pilots was for accountability and record keeping purposes. (D.E. 242 at 144). Thus, as in *Capp* and *White*, the District Court appropriately evaluated the control factor by looking to the working relationship between DynCorp and EAST employees and correctly determined that DynCorp exercised control of West.

Lastly, Petitioners' claim that "[t]he precedent now established in the Eleventh Circuit is that any prime contractor or general contractor by virtue of its contractual superiority over a subcontractor subsumes the latter's employees as its own." *See* Petition for Writ of Certiorari, p. 9. This argument is entirely meritless.

First, there is no support for Petitioners' contention that the Eleventh Circuit's five page *per curiam* unpublished opinion uprooted the nine-factor borrowed servant test for a single factor inquiry concerning contractual roles. *See* Petition for Writ of Certiorari, p. 9. In the decision below, the Eleventh Circuit merely held that the record supported

the trial court's ruling that DynCorp exercised control over West. "[W]e find no error in the [district] court's resolution of those issues of fact and its conclusion that West was a borrowed servant." (Petitioners' Appendix at 4a). Thus, the Eleventh Circuit's opinion does not abrogate or alter the nine-factor test in any way. Of note, the opinion below does not single out any particular factor that was determinative to the borrowed servant issue; thus, the undersigned is uncertain how Petitioners were able to pinpoint the control factor as creating a conflict between the opinion below and the holdings of *Capp* and *White*.

More importantly, the opinion below is an unpublished opinion and has no precedential value. "Unpublished opinions are not considered binding precedent." 11th Cir. R. 36-2. Thus, the District Court's ruling below will have no impact on future cases concerning the borrowed servant doctrine in the Eleventh Circuit or in any other circuit.

Accordingly, West's Petition for Writ of Certiorari should be denied.

B. The Decision Of The District Court And Affirmance By The Eleventh Circuit That West Was A Borrowed Servant Of DynCorp Were Plainly Correct

The decision of the District Court and the Eleventh Circuit's ruling affirming same are plainly correct. As indicated above, the record supports to District Court's determination that West was DynCorp's borrowed servant. After considering the evidence and applying the nine factors enumerated in *Ruiz v. Shell Oil Co.*, 413 F.2d 310, 313 (5th Cir. 1969), the District Court found that six out of the nine

factors favored DynCorp. (D.E. 260 at 46-51). The factors favoring DynCorp were: (1) control over the employee and the work he was performing; (2) whose work was being performed; (3) an agreement, understanding, or meeting of the minds between the original and the borrowing employer; (4) employee acquiescence to the new work situation; (5) furnishing of tools and place for performance; and (6) new employment over a considerable length of time.

1. Control

With respect to the first factor, control, the District Court concluded that DynCorp had control over West and the spraying missions he worked on. (D.E. 260 at 46-47). This finding was clearly supported by the record. Under the Prime Contract, DynCorp had final authority and was ultimately responsible to the Department of State for the operation of the program. (D.E. 242 at 9). DynCorp had final authority and was ultimately responsible for operations. (*Id.* at 24). DynCorp also had authority over the assignment of pilots to a rotation and could seek the removal a pilot from a rotation. (*Id.* at 34-35). By contrast, EAST's role was limited to supplying pilots. (*Id.* at 49).

In determining that this factor favored DynCorp, the District Court found that EAST had very little involvement with the spraying missions:

> [t]he only thing EAST d[id] in the [spraying mission] process [was] to designate . . . West as being a pilot on that particular rotation and . . . once the spray area [was] determined and the aircraft to be flown [were] determined, the only real involvement that EAST [had] in connection

> with the [spraying] mission [was] divided amount the pilots, the particular supply path to be employed in this particular operation which seems to me to be hand in hand with flying the airplane because obviously you don't want to spray the same area or run into each other in the process.

(D.E. 260 at 47).

West claims that the Eleventh Circuit in affirming the District Court has now established "that any prime contractor or general contractor by virtue of its contractual superiority over a subcontractor subsumes the latter's employees as it own for purposes of workers' compensation immunity." *See* Petitioner for Writ of Certiorari, p. 9. But the record, as indicated above, shows that the District Court's inquiry was not limited to the language of the prime and sub contracts. The District Court also looked to the actual practice between West's employer and DynCorp, as did the court in *White*, 222 F.3d at 150, and determined that West was DynCorp's borrowed servant.

2. DynCorp's Work Was Being Performed

The record also supports the District Court's finding that West was performing DynCorp's work at the time of the accident. In Larandia, West's job was to fly fixed wing aircraft for spraying missions. He lived and operated out of DynCorp's FOL. The accident occurred while West was on a spraying mission. West's aircraft was maintained by DynCorp mechanics. (*Id.* at 28). Thus, there was sufficient evidence for the District Court to conclude that it was DynCorp's work that was being performed.

3. Agreement Between EAST and DynCorp

There was clearly an agreement between EAST and DynCorp as evinced by the subcontract and the acts of the contracting parties. Pursuant to the subcontract, EAST supplied DynCorp with qualified pilots. (D.E. 242. at 47, 49). In order to satisfy its contractual obligations, EAST had the administrative burden of ensuring its pilots were qualified. In exchange, DynCorp paid EAST for the use of these pilots in its spraying missions. Further, DynCorp had the contractual obligation to provide worker's compensation benefits for these pilots. (*Id.* at 13, 19-20). The District Court found this "instructive and pervasive because [DynCorp and EAST] are businessmen who would not normally agree to provide comp coverage to someone else's employees." (D.E. 260 at 49).

4. West Acquiesced to a New Work Situation

In order to perform DynCorp's work, West moved to a foreign country. He agreed to have his living and working environment dictated by DynCorp: he lived on DynCorp's FOL, slept where DynCorp directed him to, and wore the flight suits and boots that DynCorp provided him with. (*Id.* at 22, 28, 35-36). West agreed to abstain from drinking and be subject to random drug tests by DynCorp. (*Id.* at 15-17). Although, the record does not disclose what type of work West performed for EAST pre-DynCorp, it is clear that West was not eradicating drugs in the mountains of Colombia. Clearly, the drug eradication program was a new work situation which West acquiesced to.

5. DynCorp Provided West with Tools and a Place for Performance

DynCorp provided West with tools and a place for performance. The spraying missions were conducted out of DynCorp's FOL. The aircraft piloted by West was maintained by DynCorp. DynCorp provided West with security, housing, transportation to and from Larandia, flight suits, boots, bunks and other equipment necessary for the missions. (D.E. 242 at 17, 22, 28, 35). Thus, the District Court correctly determined that this factor favored DynCorp.

6. New Employment Over a Considerable Length of Time

The District Court found that the amount of time West participated in the drug eradication program was sufficient to favor borrowed servant. The court noted that this factor was concerned with situations where an employee is hired as a trainee for a few days. (D.E. at 49-50). Here, West was not a new employee, he was involved in the program for a sufficient length of time to satisfy this factor.

Because the overwhelming majority of the *Ruiz* factors, as supported by the evidence, favored the application of the borrowed servant doctrine, the District Court correctly determined that West was DynCorp's borrowed servant. This decision was affirmed by the Eleventh Circuit and was plainly correct under established legal precedent.

CONCLUSION

The Court should deny West's Petition for a Writ of Certiorari because there are no compelling reasons to grant such a writ in this case. The decisions of the trial court and the Eleventh Circuit Court of Appeals are based upon a proper application of the longstanding borrowed servant doctrine. All issues raised by West in his Petition for a Writ of Certiorari have been previously addressed by and properly disposed of by the lower courts. For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

EDWARD J. MCMURRER
MENDES & MOUNT, LLP
750 Seventh Avenue
New York, NY 10019-6829
(212) 261-8000

THOMAS E. SCOTT*
COLE, SCOTT & KISSANE P.A.
1390 Brickell Avenue
Third Floor
Miami, FL 33131
(305) 350-5300

Counsel for Respondent

* *Counsel of Record*